

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

JEFFERY A. BROWN,

Plaintiff-Petitioner,

vs.

ERNIE L. MOORE, WARDEN,
LEBANON CORRECTIONAL
INSTITUTION,

Defendant-Respondent.

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Case No. 3:07cv022

JUDGE WALTER HERBERT RICE

DECISION AND ENTRY ADOPTING AMENDED (DOC. #11) AND
SUPPLEMENT TO AMENDED (DOC. #13) REPORTS AND
RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE, AS
SUPPLEMENTED HEREIN; PLAINTIFF-PETITIONER'S OBJECTIONS TO
SAID JUDICIAL FILINGS (DOCS. #12 AND #14) OVERRULED;
JUDGMENT TO ENTER IN FAVOR OF DEFENDANT-RESPONDENT AND
AGAINST PLAINTIFF-PETITIONER, DISMISSING PETITION FOR WRIT OF
HABEAS CORPUS WITH PREJUDICE; CERTIFICATE OF APPEALABILITY
AND ANTICIPATED REQUEST FOR LEAVE TO APPEAL *IN FORMA*
PAUPERIS DENIED; TERMINATION ENTRY

Pursuant to the reasoning and citations of authority set forth by the United States Magistrate Judge in his Amended (Doc. #11) and Supplement to Amended (Doc. #13) Reports and Recommendations, and this Court's reasoning set forth below, as well as upon a thorough *de novo* review of this Court's file and the applicable law, this Court adopts said judicial filings in their entirety, as

supplemented herein, concluding that grounds one and three were decided upon their merits by the state courts and, further, that neither of said decisions involve an unreasonable application of clearly established Supreme Court precedent and/or were the result of the state court's application of said Supreme Court precedent to the facts in an objectively unreasonable manner. Further, this Court concludes that the Plaintiff-Petitioner's second ground was procedurally defaulted. The Plaintiff-Petitioner's Objections to said judicial filings (Docs. #12 and #14) are overruled. Judgment will be ordered entered in favor of the Defendant-Respondent and against the Plaintiff-Petitioner, dismissing Plaintiff-Petitioner's Petition for Writ of Habeas Corpus, with prejudice.

In *Humphress v. United States*, 398 F.3d 855 (6th Cir.), *cert. denied*, 546 U.S. 885 (2005), the Sixth Circuit held that claims challenging a sentence, on the basis that the sentence was contrary to *United States v. Booker*, 543 U.S. 220 (2005), could not be raised during collateral review. Therein, the Sixth Circuit noted that the petitioner had initially based his challenge to his sentence on *Blakely v. Washington*, 542 U.S. 296 (2004), but that petitioner's challenge became governed by *Booker*, after the Supreme Court had issued its decision therein. 398 F.3d at 857. Thus, the Sixth Circuit has held that collateral review of claims under both *Booker* and *Blakely* is not permitted by *Humphress*. See *Swain v. United States*, 2005 WL 3065969 (6th Cir. 2005). Accordingly, this Court concludes that Plaintiff-Petitioner's *Blakely* claim cannot be raised on collateral review.

Given that the Court's rulings herein are not be debatable among jurists of reason and, further, given that any appeal from the decision rendered herein would be objectively frivolous, this Court denies both a Certificate of Appealability and an anticipated request for leave to appeal *in forma pauperis*.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

/s/ Walter Herbert Rice

February 4, 2008

WALTER HERBERT RICE
UNITED STATES DISTRICT JUDGE

Copies to:

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Chief Magistrate Judge Michael R. Merz